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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 84.

CITY BANK FARMERS TRUST COMPANY, Executor under the Will of THOMAS B. CLARKE, Deceased, Appellant,

v.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

BRIEF FOR APPELLEES

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

WM. A. SCHNADER,
Attorney General of the Commonwealth of Pennsylvania.

HARRIS C. ARNOLD,
Deputy Attorney General.
Attorneys for Appellees.

State Capitol,
Harrisburg, Pa.

INDEX

	Page
Corrections of and Additions to Appellant's Statement of the Case	1
Corrections	2
Additions	3
Summary of Argument	4
Argument	6
I. The District Court Properly Dismissed the Bill for Want of Jurisdiction	6
II. In General Tangible Personal Property Is Taxable Where It Is Found	12
Authorities for the General Rule	13
Intangible Property Tax Cases	16
Cases Involving Vessels, Rolling Stock, etc.	18
What Is Taxable Situs?	22
III. The Cases Cited as Applied to This Case	24
IV. Discussion of the Facts	27
V. Conclusion	31

TABLE OF CASES CITED

Page

Blackstone *v.* Miller, 188 U. S. 189 (1903) 23, 24, 30

Blodgett *v.* Silberman, 277 U. S. 1 (1928) 13, 15, 24, 25, 26

Bohler *v.* Callaway, 267 U. S. 479 (1925) 7

Capital Construction Co. *v.* Des Moines, 211 Iowa 1228, 235 N. W. 476 (1931) 13, 21, 22, 25

Commonwealth *v.* American Dredging Co., 122 Pa. 386 (1888) 13, 21, 22, 25

Connell's Estate, 282 Pa. 555 (1925) 11

Delaware, Lackawanna & Western Railroad Co. *v.* Pennsylvania, 198 U. S. 341 (1905) 13, 25

Dorrance's Estate, 309 Pa. 151 (1932) 29

Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204 (1930) 17, 26

First National Bank of Boston *v.* Maine, 284 U. S. 312 (1932) 17, 18, 27

Frick *v.* Pennsylvania, 268 U. S. 473 (1925) 13, 16, 24, 25, 26

Gilbert *v.* David, 235 U. S. 561 (1915) 29

Gromer *v.* Standard Dredging Co., 224 U. S. 362 (1912) .. 13, 19, 25

Hays *v.* Pacific Mail Steamship Co., 58 U. S. 596 (1855) 12, 18, 20, 22, 24

Keokuk & Hamilton Bridge Co. *v.* Salm, 258 U. S. 122 (1922) 6, 7, 8

Matthews *v.* Rodgers, 284 U. S. 521 (1932) 6, 8

New York ex rel. New York, Central & Hudson River Railroad *v.* Miller, 202 U. S. 584 (1906) .. 12, 13, 19, 22, 24, 25

Old Dominion Steamship Co. *v.* Virginia, 198 U. S. 299 (1905) 19

Porter *v.* Investors Syndicate, 286 U. S. 461 (1932) 8, 10, 11

Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18 (1891) 12, 19, 20, 25, 30

Safe Deposit & Trust Co. of Baltimore *v.* Virginia, 280 U. S. 83 (1929) 16, 26, 30

Union Transit Co. *v.* Kentucky, 199 U. S. 194 (1905) 12, 13, 14, 16, 19, 25

United States *v.* Bennett, 232 U. S. 299 (1914) 14

TEXTBOOKS

2 Cooley on Taxation (4th Ed.), Section 452 ..... 22, 30

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WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania, September Term, 1932, No. 7395, Unreported Opinion March 24, 1933 (R. 41).

BRIEF FOR APPELLEES

CORRECTIONS OF AND ADDITIONS TO APPELLANT'S STATEMENT OF THE CASE

To prevent any possible confusion as to the exact facts of this case, we feel it necessary to make certain

corrections of and additions to the appellant's statement of the case.

Corrections

Our references are to the pages of Appellant's Brief:

Page 2. "The term [of the loan] contemplated was about six months."

There is no such statement anywhere in the pleadings or the "Stipulation as to Certain Facts" (R. 40).

On the contrary, in its "Application for Appraisement and Waiver of Transfer Inheritance Tax Provisions", a part of which is quoted in Paragraph 18 of the Bill of Complaint (R. 8), appellant frankly conceded that **"no definite time was fixed as the duration of the loan".**

The injunction affidavit of Dr. Kimball (R. 27) stated (R. 28) that, "The term originally contemplated was about six months, although there was no definite understanding regarding the matter."

But this allegation was not made in the Bill of Complaint nor was it incorporated in the Stipulation (R. 40); and it is not admitted as a fact by the appellees.

Bottom of page 2. "* * * the pictures were permitted * * * to remain * * * with the understanding that they would be returned to Clarke **in New York** at any time on his request."

There is absolutely no justification for the presence of the phrase "in New York", in this statement.

Page 3. "It is customary for public museums to secure exhibitions in this manner, and the period for which the Clarke collection was held by the Museum prior to his death was shorter than the usual period of such loans."

This is rather a loose paraphrase of the statement made in Paragraph 10 of the Bill of Complaint (R. 4) that "such accommodation loans of works of art [to the Pennsylvania Museum] * * * have been continued **for an average period** considerably longer than the period from the date of the original loan in question to the death of the said Thomas B. Clarke."

Pages 4 and 5. At the top of page 4 appellant intimates that Pennsylvania has deliberately delayed a hearing on the appraisement of the Clarke paintings. It says, "To date the hearing has not been held." And on page 5, the statement is made that action by the defendants "has already been delayed for almost three years".

These statements are rather unfair.

On November 25, 1932 (R. 1) appellant obtained a restraining order (R. 31) from Judge Kirkpatrick of the District Court. That order remained effective until April 11, 1933 (R. 2) when the Bill of Complaint was dismissed. On the same day an appeal was taken to this court.

Additions

When the pictures were sent to Pennsylvania, Mr. Clarke surrendered his lease for the storage space in a New York warehouse where sixty-three of the pic-

tures had been kept (R. 34, 35). Thereafter, Mr. Clarke paid no rentals for storage space or any other storage charges on account of these pictures. He did not reserve or control any storage space adequate for the storage of the pictures in New York from March, 1928, until the time of his death on January 18, 1931. He never made any definite plans for the return of the pictures to New York, or for their removal from the Pennsylvania Museum of Art in Philadelphia, except for the absence for less than one month of four pictures which were sent to Virginia and returned to Philadelphia (R. 35).

The Pennsylvania Museum of Art in Philadelphia paid all the expenses of transportation of the pictures from New York, including insurance on them while in transit.

SUMMARY OF ARGUMENT

The appellant has an adequate remedy at law in the nature of a statutory administrative procedure. Therefore, the court below properly dismissed the bill for lack of jurisdiction.

However, if this court holds that the court below had jurisdiction, we unite with appellant in hoping that the case will be disposed of finally at this time.

At the time of Mr. Clarke's death, his collection of paintings was in Pennsylvania. It had been here for almost three years. During that time it had been offered for sale to any buyer who would give it to the

Pennsylvania Museum, Philadelphia, for permanent exhibition. While the collection was returnable to Mr. Clarke on demand, he never, during the three-year period, made any definite arrangements to remove it from Philadelphia. He had given up the storage space in New York in which most of the paintings had been kept prior to their removal to Philadelphia.

Under these circumstances we contend that the paintings had an actual situs in Pennsylvania when Mr. Clarke died and were taxable by, and only by, this State.

There is no decision of this court to the contrary; and certain apparently adverse language in decisions which are not relevant on their facts, was uttered without reference to a situation such as this.

To say that a state can tax tangible personal property within its borders only if the property is located there permanently in the strict sense of that word, would exempt from taxation the great bulk of such property.

The rule is that tangible personal property is taxable where found, subject to certain well-recognized exceptions. This case does not fall within any such exception.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DISMISSED THE BILL FOR WANT OF JURISDICTION

In the court below we did not press the jurisdictional point. However, we realize that jurisdiction cannot be acquired by consent, and we conceive it to be our duty to present to this court our reasons for believing that the court below correctly refused jurisdiction.

The court below dismissed the bill for want of jurisdiction on the ground that appellant had an adequate remedy at law, referring particularly to MATTHEWS v. RODGERS, 284 U. S. 521 (1932), and KEOKUK & HAMILTON BRIDGE COMPANY v. SALM, 258 U. S. 122 (1922).

Appellant attacks the applicability of MATTHEWS v. RODGERS by saying that in that case the aggrieved taxpayer could have paid the tax under protest and then brought suit at law to recover it. But that case did not say that the absence of that specific form of remedy in itself gives jurisdiction to Federal courts of equity. And, as the court below in the present case pointed out (R. 44), although the Pennsylvania law does not provide for payments of tax and suits to recover the tax paid, neither does it "give to the State authorities the coercive measures of distraint and levy without a prior judicial determination of the legality and amount of the tax, if the taxpayer desires it and,

therefore, he has a completer remedy than by suit to recover a tax paid".

MATTHEWS v. ROGERS conceded the basis for Federal jurisdiction, but dismissed the bill for want of equity jurisdiction. Both elements must be present to sustain such a bill as this. Here there is diversity of citizenship, a ground for Federal jurisdiction, but, we submit, no ground of equitable jurisdiction.

Appellant seeks to discredit KEOKUK & HAMILTON BRIDGE CO. v. SALM, 258 U. S. 122 (1922), by saying that no diversity of citizenship was there involved. Appellant further insists that the court below in our case misapplied the KEOKUK BRIDGE CASE by failing to distinguish between the adequate remedy necessary to satisfy the requirements of the Due Process Clause and the adequate remedy necessary to defeat equity jurisdiction. But the report of the KEOKUK BRIDGE CASE shows that the district court had sustained a motion to dismiss on the ground that "the complainant has a plain, adequate, and complete remedy at law" (p. 123). And this court affirmed, not on the ground that the basis of the suit did not involve a valid constitutional question, but because plaintiff had ample opportunity to question its tax assessments through the statutory procedure provided by state law.

In BOHLER v. CALLAWAY, 267 U. S. 479 (1925), this court, in distinguishing the KEOKUK BRIDGE CASE from the case then before it, said (pp. 486-487):

> "* * * Appellants cite Keokuk & H. Bridge Co. *v.* Salm, 258 U. S. 122, 66 L. ed. 496, 42 Sup. Ct.

Rep. 207, as indicating the contrary. That was a bill in equity by a bridge company to enjoin a tax assessment by county assessors on a railroad bridge, because of discrimination. The assessment made by the county assessors was subject to revision by a board of review required to give a hearing and to correct the assessment as should appear just. The payment of taxes was not to be enforced by distraint or levy, but by legal proceedings in a civil suit for the collection of a debt in which the owner might appear and defend on any legal ground, including discrimination. The complainant there brought his bill without taking any of the steps offered by the statute as an administrative remedy and ignored the defense he might make in the suit to collect the tax. * * *"

Likewise in the present case, the tax is not to be enforced by levy or distraint. And likewise appellant has failed to pursue the administrative remedies afforded by the tax law itself.

But, a more recent decision of this court renders unnecessary reliance on either MATTHEWS v. RODGERS or KEOKUK & HAMILTON BRIDGE CO. v. SALM. PORTER v. INVESTORS SYNDICATE, 286 U. S. 461 (1932), affords ample justification for the action of the court below.

In the PORTER CASE a Minnesota corporation sought an injunction in a Federal district court, against an officer of the State of Montana, to prevent revocation of the plaintiff's license to sell securities in Montana. The defendant, who was State Investment Commissioner, had promulgated certain rules applicable to plaintiff, and had threatened to revoke plaintiff's license if it failed to comply with the rules. Plaintiff

alleged that such a revocation would deprive it of rights guaranteed to it by the Federal Constitution.

The defendant objected to the jurisdiction. But a three-judge court held that it had jurisdiction, and issued the injunction sought by the plaintiff. On appeal to this court, the decree was reversed after consideration of the jurisdictional question only. The ground of the reversal is stated in the following portion of the opinion of Mr. Justice Roberts (p. 468):

> "We are of opinion that the appellee failed to exhaust its administrative remedy before applying to the District Court for injunctive relief. The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code (supra) confers on any interested person dissatisfied with a finding or decision by the commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order and set it aside as unjust or unreasonable, and directs that on the hearing the judge 'may set aside, modify or confirm said * * * decision as the evidence and the rules or (sic) equity may require.' The section confers the right to appeal to the State Supreme Court from the judgment of the trial court. Clearly the function of the state district court under the statutory mandate is not solely judicial, that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. The duty is laid on the court to examine the evidence presented and either to set aside or to modify or to affirm the commissioner's orders, as the proofs may require. The legislative process remains incomplete until the action of that court shall have become final. Prentis *v.* Atlantic Coast Line Co. 211 U. S. 210, 229, 230, 53 L. ed. 150, 160, 29 S. Ct.

> 67; Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 444, 450, 451, 60 L. ed. 1084, 1095, 1097, 1098, 36 S. Ct. 637. And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. Keller v. Potomac Electric Power Co. 261 U. S. 428, 438 442, 67 L. ed. 731, 734 736, 43 S. Ct. 445. When the appellee was notified on June 22, 1931, that the rule adopted by the appellant would become effective July 22nd of the same year, an action could have been filed in the state court and a hearing had upon all questions of fact and law touching the propriety and legality of the order."

The present case is parallel to the Pourten Case. The Pennsylvania statute (Bill of Complaint, paragraph 14; R. 6) provides for the fixing of the tax by an administrative officer in the first instance. From his action an appeal may be prosecuted to the Court of Common Pleas of Dauphin County. On such an appeal the court may "determine all questions of valuation, and the liability of the appraised estate for such tax subject to the right of appeal to the Supreme or Superior Court."

This statutory provision is an exact counterpart of the provision made by the Act of June 20, 1919, P. L. 521, Art. II, Sec. 13, (immaterially amended by the Act of June 22, 1931, P. L. 689), 72 PS Sec. 2327, for appeals to the several orphans' courts from appraisements of the estates of resident decedents for inheritance tax purposes. That the statutory language quoted authorizes the court to examine the question *de novo* and fix the tax and determine all questions of liability would seem to be obvious from the words

themselves; it is confirmed by the construction of the State Supreme Court: CONNELL'S ESTATE, 282 Pa. 555, 558 (1925).

Therefore, we have present every element mentioned by Mr. Justice Roberts in the PORTER CASE, an initial appraisement or assessment by an administrative officer, an appeal from his action, and an entirely new determination by the court on that appeal. Clearly the action of the court is a continuance of the "legislative process" just as fully as was the action of the state court in the PORTER CASE.

Certain of the cases cited by the court below in the present case are discounted by appellant because it is said that they did not involve diversity of citizenship. The PORTER CASE did involve it.

Therefore, we submit that on the authority of the PORTER CASE alone, the decree of the court below in this case should be sustained. Plaintiff has an adequate remedy at law, namely, an administrative review of the original assessment of the tax,— and that remedy has not been exhausted.

One other consideration may be mentioned. If the jurisdiction of a Federal court in equity in a case of this kind is to be sustained merely on the ground of diversity of citizenship, it would mean that non-residents have a remedy by injunction which residents of Pennsylvania aggrieved by assessment of the very same tax could not have.

And if the jurisdiction should be sustained on the ground that substantial constitutional questions are

involved, it would mean that even citizens of Pennsylvania who, on constitutional grounds, question an inheritance tax appraisement involving the necessary amount, need not follow the statutory procedure for appeal, but may take their grievances into the Federal courts by bill in equity for an injunction.

II.

IN GENERAL TANGIBLE PERSONAL PROPERTY IS TAXABLE WHERE IT IS FOUND

Generally speaking, tangible personal property is taxable where it is, regardless of the owner's domicile.

Of course, a state cannot impose a property tax on tangible property *in transitu* through the state or upon property which has come to rest within the state for a fleeting time, the owner having a present intention promptly to remove it. These propositions do not require the citation of authority.

Possibly, property necessary for the transaction of certain types of business is not subject to the general rule which we have stated. We have in mind vessels, rolling stock of railroads, dredging equipment, road-building machinery, and the like. See HAYS v. PACIFIC MAIL STEAMSHIP CO., 58 U. S. 596 (1855); PULLMAN'S PALACE CAR COMPANY v. PENNSYLVANIA, 141 U. S. 18 (1891); UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194 (1905); NEW YORK EX REL. NEW YORK CENTRAL & HUDSON RIVER RAILROAD v. MILLER, 202 U.

S. 584 (1906); the dissenting opinion in Thomson v. Standard Dredging Co., 224 U.S. 362 (1912); Commonwealth v. American Dredging Company, 122 Pa. 386 (1888); Capital Construction Co. v. Des Moines, 211 Iowa 1228, 235 N. W. 476 (1931). Such property must be moved from place to place to enable the owner's business to be carried on. It would be extremely inequitable, to say the least, to enable the property to be taxed wherever it had come to rest; in the course of a year the property might become subject to taxation in a number of jurisdictions.

But, where the property involved is not of such a nature that its very use necessitates its movement from place to place, we submit that it is taxable where it has come to rest for an indefinite time.

Also, it is axiomatic that tangible personal property cannot be taxed by a state if the property has been permanently removed from the state: Delaware, Lackawanna & Western Railroad Co. v. Pennsylvania, 198 U. S. 341 (1905); Union Transit Co. v. Kentucky, 199 U. S. 194 (1905).

Authorities for the General Rule

To establish the general rule which we have stated, we cite Frick v. Pennsylvania, 268 U. S. 473 (1925), and Blodgett v. Silberman, 277 U. S. 1 (1928).

In the Frick Case, Mr. Frick having been domiciled in Pennsylvania, that State attempted to levy an inheritance tax upon property of his estate, as follows (page 487): (1) Rare paintings, rugs, furniture, bronzes, porcelains, and other art treasures housed

in a building in New York City especially constructed for the purpose; (2) Furniture, household furnishings, automobiles, tools, etc., in Mr. Frick's New York house and garage; and (3) Paintings, household furnishings, farming implements, etc., on Mr. Frick's estate at Prides Crossing, Massachusetts.

This court held that the property was beyond Pennsylvania's taxing power.

There was no discussion, in the opinion, of the question whether the property was "permanently" in New York and Massachusetts. The essence of the court's decision was stated by Mr. Justice Van Devanter, at page 489:

> "* * * as respects tangible personal property having an actual situs in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the domicil of the owner. * * *"

At page 491, after discussing and quoting from UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194 (1905), and UNITED STATES v. BENNETT, 232 U. S. 299 (1914), Mr. Justice Van Devanter said:

> "Other decisions show that the power to regulate the transmission, administration, and distribution of tangible personal property on the death of the owner rests with the state of its situs, and that the laws of other states have no bearing save as that state expressly or tacitly adopts them,—their bearing then being attributable to such adoption, and not to any force of their own. * * *"

And at page 492:

> "* * * Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states, New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those states, and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts. In these respects the situation was the same as if the property had been immovable realty. * * *"

In the Blodgett Case Connecticut attempted to impose an inheritance tax on bank notes and coin which belonged to a resident of Connecticut but at his death were in a safe deposit box in New York. This court held that Connecticut could not impose the tax.

At page 18, Chief Justice Taft said:

> "* * * But we think that money, so definitely fixed and separated in its **actual situs** from the person of the owner as this was, is tangible property and can not be distinguished from the paintings and furniture held in the Frick Case to be taxable only in the jurisdiction where they were."

In that case the decision was based upon the mere presence of the money in New York.

Under the principles enunciated in these decisions, New York could not tax the Clarke paintings; Pennsylvania could tax them.

Intangible Property Tax Cases

Repeatedly this court has said that the rules relating to the taxation of tangible property are different from those governing the taxation of intangible property: Fitch v. Pennsylvania, supra, at page 494; Union Transit Co. v. Kentucky, 199 U. S. 194, 206 (1905).

Therefore, the intangible property tax cases cited by the appellant as the basis for its argument have little, if any, importance here.

The cases are relied upon by the appellant because of certain expressions in the opinions, not necessary to the decisions.

In Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U. S. 83 (1929), this court did state that "tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place". We repeat, that proposition is axiomatic. However, it does not follow by any means that the converse is true and that a state may tax tangible personal property within its borders only if the property is permanently located there.

And, in any event, the facts of the case show that the word "permanently" was not used in its ordinarily strict sense. The court ruled that certain securities held in trust in Maryland by a Maryland corporation could not be made the subject of taxation by the State of Virginia, which was the domicile of the beneficiaries of the trust. At page 92, the court said that these securities had "a permanent situs for lawful taxation"

in Maryland. But, by the express terms of the trust, the trust res would become the property of the Virginia beneficiaries at a fixed time some years thereafter. Therefore, it is obvious that the term "permanent situs" was not used to mean location within the state in such a manner that the property could never be removed. On the contrary, there was a definite time fixed when it would become the property of residents of Virginia, and, as it was intangible property, it would then be taxable only at the domicile of the owners: First National Bank of Boston v. Maine, 284 U. S. 312 (1932).

Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930), is cited by the appellant for the proposition that a state cannot tax tangible property which has been permanently removed from its borders. This cannot be disputed.

First National Bank of Boston v. Maine, 284 U. S. 312 (1932), is cited for the proposition that personal property is immune from taxation by more than one state at the same time or for the same period. This also is conceded, but has no importance here.

It is our position that the Clarke collection is not subject to inheritance taxation by New York and Pennsylvania, but is subject to such taxation only by Pennsylvania. There is no question of double taxation here. We have no doubt that the presence here as *amici curiae* of the Tax Commission of New York indicates that New York has no intention of refusing to refund the tax already paid if this court determines that the paintings are taxable by Pennsylvania.

The appellant also emphasizes the quotation from the opinion in FIRST NATIONAL BANK OF BOSTON v. MAINE, that, as respects tangible personal property, "The rule [*mobilia sequuntur personam*] has gradually yielded to the law of the place where the property is kept and used."

Why this is important to the appellant we fail to see. The Clarke pictures were kept in Pennsylvania, and used in Pennsylvania. They certainly were not being kept or used in New York.

Cases Involving Vessels, Rolling Stock, etc.

We shall now briefly discuss the cases dealing with the taxability of vessels, railroad rolling stock and the like.

In HAYS v. PACIFIC MAIL STEAMSHIP CO., 58 U. S. 596 (1855), California sought to tax ocean-going vessels, plying between New York, San Francisco and other ports. New York was the registered home port of the vessels. The vessels merely touched the port of San Francisco to discharge and take on cargoes, and to receive such attention as was necessary to enable them to proceed. The duration of the stay was usually ten or twelve days.

This court held that "the State of California had no jurisdiction over these vessels for the purpose of taxation".

On the other hand, where ships have been used and kept only within the boundaries of a single state for a number of years, they do acquire a taxable situs there:

Old Dominion Steamship Co. v. Virginia, 198 U. S. 299 (1905).

In New York ex rel. New York Central & Hudson River Railroad v. Miller, 202 U. S. 584 (1906), the State of New York was permitted to impose a franchise tax on all the property of the railroad, including all of its cars. This court held it immaterial that some if not all of the cars, spent a part of the tax year in other states; but it did "not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there" (p. 597).

In Cromer v. Standard Dredging Co., 224 U. S. 362 (1912), Porto Rico was permitted to tax dredging equipment used in the harbor of San Juan for fulfilling a contract with the United States Government. At page 372, Mr. Justice McKenna said:

> "The fact is not alleged, and no other fact which removed the property from the application of the rule that tangible personal property is subject to taxation by the state in which it is, no matter where the domicil of the owner may be * * *."

In Union Transit Co. v. Kentucky, 199 U. S. 194 (1905), Kentucky sought to tax cars permanently located in other states, and employed in such states for the purposes of the owner's business. This court held that the tax could not be imposed.

In Pullman's Palace Car Company v. Pennsylvania, 141 U. S. 18 (1891), this court had before it the question of the taxability of cars operated by the Pullman Company on railroads extending in and through

Pennsylvania. Pennsylvania had levied a capital stock tax against the company, based on a calculation of the average number of cars employed in the State, the company being a foreign corporation.

Although the constitutional objection to the tax was that it constituted a burden on interstate commerce, the court was obliged to determine whether property of the company, namely cars, had a taxable situs in Pennsylvania, in spite of the fact that they ran on lines which extended beyond the borders of the State.

This court ruled that the company had and used property which was sufficiently within the jurisdiction of Pennsylvania to give it a taxable situs there. The following excerpts from the opinion are pertinent here (p. 22):

> "'* * * A nation within whose territory any personal property is **actually situate** has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.'
>
> "For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the **place where it is**, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax. * * *"

In distinguishing the facts of the PULLMAN CASE from earlier cases concerning taxability of ships in foreign ports, (*e. g.* HAYES v. PACIFIC MAIL STEAMSHIP CO., 58 U. S. 596 [1855]), Mr. Justice Gray said (141 U. S. at p. 23) that the ships were not taxable because they

were not "in any proper sense, abiding within" the limits of the state in which the foreign port was located.

In COMMONWEALTH v. AMERICAN DREDGING CO., 122 Pa. 386 (1888), the Supreme Court of Pennsylvania held that tug boats, scows and dredging machinery are taxable at the domicile of the owner. The court rested its decision squarely on the ground that (p. 391):

> "* * * From the nature of the business, it [the equipment of the dredging company] is in one place to-day and in another to-morrow, and, hence, not taxable in the jurisdiction where temporarily employed. * * *"

CAPITAL CONSTRUCTION CO. v. DES MOINES, 211 Iowa 1228, 235 N. W. 476 (1931), involved two questions, first, the right of an Iowa city to tax road machinery which on the assessment date was not in the state, and, second, the right to tax the property as between different tax districts in Iowa.

On the first question, the court found that the removal of the machinery to Illinois was for a temporary period, for completion of a road contract, — and that when the job was done the machinery was brought back to Iowa. That was ample basis for a finding that the absence was purely temporary. The second point involved the construction of an Iowa statute and determination of the burden of proof. No constitutional question or determination of actual situs was involved.

Even these cases, dealing with tangible personal property which must be moved from place to place to

enable its owner's business to be carried on, adhere very closely to the general rule that actual situs, not domicile of the owner, is the test of the right to tax. In the cases in which the state of the domicile was permitted to tax the property, the property did not have an actual situs in any other state. This was clearly the situation in HAYS v. PACIFIC MAIL STEAMSHIP CO., NEW YORK EX REL. ETC. v. MILLER, COMMONWEALTH v. AMERICAN DREDGING CO., and CAPITAL CONSTRUCTION CO. v. DES MOINES.

What is Taxable Situs?

A true description of the requisites for the acquisition of a taxable situs is set forth in 2 COOLEY ON TAXATION (4th Ed.), Section 452, page 982, as follows:

> "In order to acquire a situs in a state or taxing district so as to be taxable in the state or district regardless of the domicile of the owner and not taxable in another state or district at the domicile of the owner, tangible personal property must be **more or less permanently** located in the state or district. * * *"

And again, after pointing out that property in transit does not acquire a situs within the state until the transit has ended, the author says (pages 987-988):

> "A more difficult question arises where the transit element is wanting or is subordinate, as where personal property comes into a state to be kept there or used there for a considerable period of time but with no intention perhaps of keeping it there permanently. The governing rule, as usually stated, is that the taxable situs depends on whether the property is 'permanently' within the

state. However, in this connection, the word 'permanently' is apt to be misleading unless read in connection with the facts of the particular case. **It means a more or less permanent location for the time being.** * * *"

On this point, BLACKSTONE v. MILLER, 188 U. S. 189 (1903), is important. We realize that is has been overruled insofar as it held that intangible property could be taxed elsewhere than at the owner's domicile. But it is still a precedent on the question of the acquisition of a taxable situs.

This court decided in that case that money collected by a New York agent of a resident of Illinois, and held by the agent in its bank in New York subject to order of the owner, was subject to an inheritance tax in New York upon the death of the owner while domiciled in Illinois.

Concerning the acquisition of a taxable situs in New York, Mr. Justice Holmes said (page 203):

"* * * It is probable, of course, that he [the nonresident owner] did not intend to leave the fund there forever, and that he was looking out for investments, but he had not found them when he died. * * *

"* * * We also must take it to have been found that the property was not *in transitu* in such a sense as to withdraw it from the power of the state, if otherwise the right to tax the transfer belonged to the state. **The property was delayed within the jurisdiction of New York an indefinite time, which had lasted for more than a year,** so that this finding at least was justified. * * *"

The foregoing language aptly applies to the present case. Here the indefinite time had lasted for almost three years.

When speaking of the taxability of tangible property, Mr. Justice Holmes said (page 204) that it may be taxed "wherever the property is found."

The BLACKSTONE CASE is authority for the proposition that property left in a state other than the state of the owner's domicile for an indefinite time, — in that case, only a year, — acquires a taxable situs, even though the owner did not intend to leave the property there forever, but only while he arranged for further disposition of it.

We earnestly submit that the FRICK CASE, BLODGETT V. SILBERMAN and other authorities cited make it clear that tangible personal property, other than that peculiarly useful for mobile pursuits, is taxable in the state in which it has come to rest for an indefinite time.

III.

THE CASES CITED AS APPLIED TO THIS CASE

We have discussed not only the cases upon which we rely, but also those cited in opposing briefs.

How do the cases cited apply to the facts involved in the present case?

We submit that HAYS V. PACIFIC MAIL STEAMSHIP CO., NEW YORK EX REL. NEW YORK CENTRAL ETC., RAIL-

ROAD v. MILLER, COMMONWEALTH v. AMERICAN DREDGING COMPANY, and CAPITAL CONSTRUCTION CO. v. DES MOINES are wholly inapplicable. Ocean vessels, railroad rolling stock, dredging equipment, and road-building machinery, going from state to state, must be treated as a special class of property for which special rules must be provided.

However, even though they involved these special classes of property PULLMAN'S PALACE CAR COMPANY v. PENNSYLVANIA and GROMER v. STANDARD DREDGING CO., are authorities sustaining Pennsylvania's right to tax the Clarke paintings.

As the Clarke paintings were not permanently outside of Pennsylvania on the date of Mr. Clarke's death, the decisions in DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. v. PENNSYLVANIA and UNION TRANSIT CO. v. KENTUCKY are of little value in determining whether **Pennsylvania** could tax the paintings. But the former case is authority for the proposition that **New York** could **not** tax the collection.

In the D. L. & W. CASE the coal had been shipped out of Pennsylvania to be sold. It could be returned to that State, but the possibility was remote.

After the Clarke collection reached Pennsylvania it was offered for sale provided it should be left by the buyer at the Pennsylvania Museum for exhibition. If sold, it could not go back to New York.

The FRICK CASE and BLODGETT v. SILBERMAN deny New York's right to tax, and, therefore, sustain Pennsylvania's right.

In the FRICK CASE, the household furniture, automobiles, tools, etc., in the New York house and garage and at Prides Crossing, Massachusetts, could readily be interchanged with property of a similar nature in Mr. Frick's Pennsylvania home. They were movable property.

There is no distinguishing feature here. Mr. Clarke's pictures were in Pennsylvania. There was **presently** no other place for them. They might have been returned to New York if Mr. Clarke had seen fit to procure a place to put them, but he did not do so. Had the pictures been sold, under the option given by Mr. Clarke, they would have remained in Pennsylvania.

Pennsylvania was not permitted to tax the tangible personal property in the Frick houses in New York and Massachusetts. New York could not validly tax the Clarke collection.

In BLODGETT V. SILBERMAN the currency was in New York. Therefore Connecticut could not tax it.

In this case, the pictures were in Pennsylvania. Therefore, New York could not tax them.

In neither the FRICK CASE nor the BLODGETT CASE was there any discussion about the **permanency** of the presence of the property where it was found on the date of the owner's death. It was taxable where it was, and not taxable by the state of the owner's domicile.

SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE V. VIRGINIA, FARMERS LOAN & TRUST CO. V. MINNESOTA

and First National Bank of Boston v. Maine do not apply to this case because they involved the taxability of intangible, not tangible, property.

IV.

DISCUSSION OF THE FACTS

We repeat that nowhere in the record is there any justification for the statement which occurs in opposing briefs that Mr. Clarke at any time intended that his paintings should be returned **to New York.** He had made a loan, not a gift. Therefore, the paintings were to be returned to him, but there is nothing to show that he had a definite intention that they should go back to New York.

Mr. Clarke, immediately upon making the loan, gave up the storage space where most of the paintings had been kept while in New York. This is eloquent evidence of his intention to keep the pictures in Pennsylvania for an indefinite time.

About a year after the loan was made (R. 35), Mr. Clarke gave to the Director of the Pennsylvania Museum in Philadelphia what amounted to an option to buy his entire collection. However, he made it a condition that the purchaser must present the collection to the Pennsylvania Museum at Philadelphia. Obviously, this option contemplated that the paintings would remain permanently in Philadelphia.

This option continued from about March, 1929, to July 17, 1930. Thereafter, until the time of his death

on January 18, 1931, Mr. Clarke was willing to dispose of his pictures to any purchaser who would buy the collection as a whole for presentation to the Pennsylvania Museum or to a substantially similar institution and who would pay the price set upon it by Mr. Clarke (R. 36).

Such a sale would certainly not involve the return of the paintings to New York unless the "substantially similar institution" might happen to be a New York institution.

In April, 1929, four portraits were sent from Philadelphia to Richmond for exhibition. In May of the same year they were returned, not to New York, but to Philadephia. That was their situs for the time being.

When Mr. Clarke died, the pictures were in Pennsylvania, where they had been for two years and ten months.

Under these facts there cannot be a doubt that for at least a year and ten months prior to Mr. Clarke's death, his paintings had been in Pennsylvania under conditions indicating that they might never be returned to New York.

We are not arguing that they were permanently in Pennsylvania, but we do say that they were here for an indefinite time. They had an actual situs here. They were commingled with other property of a like character in Pennsylvania. They were housed and exhibited in a great public museum with other valuable

works of art. They were being protected by Pennsylvania. As between New York and Pennsylvania, Pennsylvania is the state which had the power to tax them at the time of Mr. Clarke's death.

If it be argued that under the decisions it must be shown that the property was being "kept and used" in Pennsylvania, the facts meet that test. The paintings were kept in Pennsylvania, and they were used here for the only purpose for which paintings can ever be used.

It is interesting to reflect that before the paintings came to Pennsylvania, most of them were in storage. They had been kept in New York, but not used.

If there is any importance attached to the fact that on several occasions Mr. Clarke "suggested" that his collection be returned (R. 4), and, if these suggestions can be construed as declarations of intention to return the paintings to New York, they were, when not carried out, what are known in the law of domicile as mere floating intentions and, as such, were not sufficient to shift the situs for taxation from Pennsylvania back to New York. See GILBERT v. DAVID, 235 U. S. 561, 569 (1915); DORRANCE'S ESTATE, 309 Pa. 151, 172 (1932), certiorari denied, U. S. , 53 Sup. Ct. 507 (1933).

Suppose Mr. Clarke had leased a property in Philadelphia from month to month, and had moved his paintings into the leased property, and, under his own name had exhibited them, either free or for an admission fee. Suppose that the exhibition had lasted for almost three years, and that during the course of it, Mr.

Clarke had offered the collection for sale to anyone who would agree not to move the paintings out of Philadelphia.

Could anyone doubt that under these circumstances, the property would have been subject to the jurisdiction of Pennsylvania; that the property would have had an "actual situs" here?

The real facts are equally as strong.

There is no doubt that, in the language of COOLEY, the paintings were "more or less permanently" located in Philadelphia "for the time being."

The presence of the pictures in Pennsylvania was as permanent as any location of personal property is likely to be. It was of a decidedly more permanent character than the presence of the securities in Maryland in SAFE DEPOSIT & TRUST CO. OF BALTIMORE v. VIRGINIA, more permanent than the location of the funds in New York in BLACKSTONE v. MILLER, and more permanent than the Pullman cars in the PULLMAN CASE.

The pictures were "actually situate" in Pennsylvania; they were "abiding within" its limits; they constituted "property found within its jurisdiction."

V.

CONCLUSION

We believe that the court below correctly dismissed the bill of complaint for want of jurisdiction.

However, if the court had jurisdiction, we submit that the bill must nevertheless be dismissed because:

(a) The defendants have a right, as officers of Pennsylvania, to tax any tangible personal property which has an actual situs in that State; and

(b) The Clarke collection of paintings under the facts set forth in the pleadings and the stipulation of counsel, had an actual situs in Pennsylvania on the date of Mr. Clarke's death.

Respectfully,

WM. A. SCHNADER,
Attorney General.

HARRIS C. ARNOLD,
Deputy Attorney General.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 84.

CITY BANK FARMERS TRUST COMPANY, Executor under the Will of THOMAS B. CLARKE, Deceased, Appellant,

v.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

SUPPLEMENTAL MEMORANDUM FOR APPELLEES IN ANSWER TO APPELLANT'S REPLY BRIEF

WM. A. SCHNADER,
Attorney General.

State Capitol,
Harrisburg, Pa.

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IS TRANSFER INHERITANCE A LIEN ON TANGIBLE PERSONAL PROPERTY UNDER THE LAW OF PENNSYLVANIA?

At the oral argument in this case on November 9, 1933, I stated that Section 1401 of The Fiscal Code (Act of April 9, 1929, P. L. 343) does not impose a lien for transfer inheritance tax upon tangible personal property.

At page 10 of their Reply Brief, counsel for the ap-

pellant have incorporated a footnote the obvious purpose of which is to contradict my statement.

Counsel italicize the following language:

> "* * * but the lien of transfer inheritance taxes shall be limited to the property chargeable therewith, and, unless such taxes shall be sued for within five years after they are due, they shall cease to be a lien as against any purchaser of real estate."

The primary purpose of this memorandum is to give to the court fully the law regarding liens for transfer inheritance tax as it exists in Pennsylvania.

Section 3 of the Act of June 20, 1919, P. L. 521, provides that, "The tax on real estate shall remain a lien on the real estate on which the same is chargeable until paid."

In SHUGARS ET AL. V. CHAMBERLAIN AMUSEMENTS ENTERPRISES, INC., 284 Pa. 200 (1925), the Supreme Court of Pennsylvania held (page 206) that "the tax springs into life on the death of property owners; eo instanti, it becomes seated on their estates."

And at page 207, the court said:

> "* * * the legislature ordered that the tax, **when on real estate,** should remain a lien until paid. * * *"

Section 35 of the Act of 1919 prohibited the transfer of the stock of any Pennsylvania corporation or of any national bank located in Pennsylvania standing in the name of the decedent until the transfer inheritance tax had been

paid unless the Auditor General consented to the transfer prior to the payment of the tax.

The Act of 1919 did not impose a lien upon tangible personal property, nor does Section 1401 of The Fiscal Code, to which we have referred.

That section provides that:

> "All State taxes imposed under the authority of any law of this Commonwealth, * * * and unpaid bonus, interest, penalties, and all public accounts settled against any corporation, association, or person, shall be a first lien upon the franchises and property, both real and personal, of such corporation, association, or person, from the date of settlement, and whenever the franchises or property of a corporation, association, or person, shall be sold at a judicial sale, all taxes, interest, bonus, penalties, and public accounts, due the Commonwealth, shall first be allowed and paid out of the proceeds of such sale, before any judgment, mortgage, or any other claim or lien against such corporation, association, or person, but the lien of transfer inheritance taxes shall be limited to the property chargeable therewith, and, unless such taxes shall be sued for within five years after they are due, they shall cease to be a lien as against any purchaser of real estate."

Transfer taxes are never "settled." That term is technical in the law of Pennsylvania and applies only to corporation and certain other taxes. All of the taxes "settled" by the Department of Revenue are catalogued in Section 202 of The Fiscal Code (Act of April 9, 1929, P. L. 343).

Section 203 of the same act is entitled, "Duties in Connection with the Collection of State Taxes Not Settled by the Department." And clause (h) of that section renders it the duty of the Department of Revenue "to collect the transfer inheritance tax payable on estates of nonresident decedents."

Section 1401 of The Fiscal Code **reduced the duration of liens on real estate** for transfer inheritance tax. Under the former law the lien continued until the tax was paid. Under Section 1401 the lien ceases to exist unless the tax is sued for within five years after it is due. This is the extent to which Section 1401 affects liens for transfer inheritance tax. It does not create liens on tangible personal property, taxes on which are not "settled," but, as we have shown, collected without "settlement."

There is no lien on tangible personal property under any act.

We also have the following comments to make on other statements made in the Reply Brief:

It is immaterial whether the Commonwealth can appeal to the Court of Common Pleas of Dauphin County.

Once an appeal has been taken, the entire matter is before the court *de novo*, except that the appellant cannot raise any objections not specified in his appeal.

COMMONWEALTH v. MANOR GAS COAL CO., 2 Dauphin Co. 121, cited to the contrary in the footnote on page 2 of the Reply Brief, was decided in 1899,—twenty years be-

fore the passage of the present Pennsylvania inheritance tax act. It did not involve inheritance tax at all.

And it is not a fact that in this case the Court of Common Pleas could not have been called upon to consider questions of valuation "since there is no dispute as to the valuation of the paintings here involved" (Reply Brief, p. 4).

When the bill of complaint was filed, appellant had no means of knowing what the State's position on valuation would be.

The fact that the defendants in their answer admitted the valuation stated in the bill of complaint has no bearing whatever on the situation existing before the bill was filed.

Respectfully submitted,

WM. A. SCHNADER,
Attorney General.